Supreme Court, U.S.
FILED
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No. 94-1437

IN THE

Supreme Court of the United States

October Term, 1994

CONOPCO, INC. D/B/A CHESEBROUGH-POND'S USA CO.

Petitioner,

v.

THE MAY DEPARTMENT STORES COMPANY, VENTURE STORES, INC., THE BENJAMIN ANSEHL COMPANY, AND KESSLER CONTAINERS, LTD.

Respondents.

On Petition for a Writ of Certiorari from the United States Court of Appeals for the Federal Circuit

BRIEF OF THE MAY DEPARTMENT STORES COMPANY AND VENTURE STORES, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT PURSUANT TO RULE 29.1

The only parties to this action are those listed in the caption. Although represented jointly, The May Department Stores Company and Venture Stores, Inc. are now independent companies. At one time in the past, Venture Stores, Inc. was a *subsidiary* of The May Department Stores Company. The May Department Stores Company was joined in this action for reasons not relevant to the Petition for Certiorari.

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ABBREVIATIONS APPEARING IN THIS BRIEF

Ansehl	The Benjamin Ansehl Company, a Respondent in this matter, a Defendant in the original action
Chesebrough	Conopco, Inc. doing business as Chesebrough Pond's USA Co., Petitioner in this matter, Plaintiff in the original action
May	The May Department Stores Company, a Respondent in this matter, a Defendant in the original action
Pet.	The Petition for Certiorari filed by Conopco, Inc.
Pet. App.	Appendix to the Petition for Certiorari filed by Conopco, Inc.
Target	Target Stores, a division of Dayton Hudson Corporation; neither Target Stores nor Dayton Hudson is a party to this action
VICL	Vaseline Intensive Care Lotion
Venture	Venture Stores, Inc., a Respondent in this matter, a Defendant in the original action

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Respondents, The May Department Stores Company ("May") and Venture Stores, Inc. ("Venture") hereby jointly oppose the Petition for Writ of Certiorari filed by Conopco, Inc., doing business as Chesebrough-Pond's USA Co., ("Chesebrough") for review of a judgment of the United States Court of Appeals for the Federal Circuit in this case.

I. STATEMENT OF THE CASE

Contrary to the assertions of Chesebrough, this is a case confined to its unique facts. There are no overriding issues of law or conflicts between or among the circuits which give to this matter the significance of a case deserving of the attention of the United States Supreme Court.

Applying the Eighth Circuit's[1] standard of review in relation to the trade dress and trademark claims of Chesebrough, the Federal Circuit noted clear error in the trial court's finding of "actual confusion". Pet. App. 11a-12a. In reversing the trial court, the Federal Circuit held that the one (1) consumer whom Chesebrough asserted had been "confused" by a private label product (significantly, a Target Stores[2] private label product, ***not*** a Venture[3] private label product) was ***not actually confused***. *Id.* This view was even endorsed by dissenting Judge Mayer. Pet. App. 30a. Actual confusion is ***the*** essential element for imposing monetary damages in trade dress and trademark infringement actions in the Eighth Circuit. Pet. App. 10a.

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[1] The Federal Circuit was established to hear patent appeals from throughout the United States. 28 U.S.C. §1295. In all other facets of an appeal, the Federal Circuit applies the law of the circuit from which the action arose. *Cicena Ltd. v. Columbia Telecommunications Group*, 900 F.2d 1546 (Fed. Cir. 1990). Here, the appeal was from a decision of the United States District Court for the Eastern District of Missouri, which is within the Eighth Circuit.

[2] Target Stores ("Target") is a division of Dayton Hudson Corporation. Neither Target nor Dayton Hudson Corporation is in any way related to Venture or May.

[3] Although this Brief is submitted on behalf of both Venture and May, it should be noted that none of the allegedly infringing products were sold through May. Venture was a wholly owned subsidiary of May at one point in time. It has always been the position of May and Venture that May is not responsible in any way for the alleged acts of infringement asserted by Chesebrough.

The Federal Circuit further determined that the trial court ***omitted*** consideration of certain ***critical undisputed facts*** (i.e. Venture's use of its unique logo on its products and a long history of side-by-side sales) which should have been included in reaching the ultimate issue of "likelihood of confusion". Pet. App. 16a-23a The combination of a clearly erroneous finding of actual confusion and the trial court's failure to consider certain critical undisputed facts was more than sufficient, in the opinion of the Federal Circuit, to support reversal on the issue of trade dress and trademark infringement.

The history of this matter is best explained by photographs of the products at issue ***and*** those products ***not*** at issue. The next pages display photographs of certain trade dress used by the parties before and after the filing of this action.



A Pre-June 1989
Chesebrough Product



A Pre-June 1989
Venture Product
(*Not* Infringing)



Post-June 1989
Chesebrough Product



Post-June 1989
Venture Product
(Allegedly Infringing)

The photographs in Appendices A and B expand on this evidence.

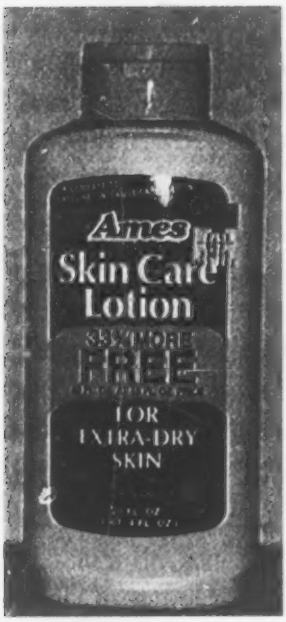
Chesebrough has now admitted that:

> "In 1990, various other retailers introduced skin care lotion products to compete with the relaunched VICL. However, unlike Venture, ***these retailers did not copy the trade dress of the relaunched VICL.***" (Emphasis added) Pet., p. 8, n. 4.

By this admission, Chesebrough has agreed that the following third-party trade dress, among others (see Appendices A, B and C) are ***not*** infringing:



Target Private Label Product
(Appendix A-1)



Ames Private Label Product
(Appendix A-2)



"Enriched" Private Label Product
(Appendix A-3)

As emphasized by Chesebrough, legal actions have not been brought against any of these third parties based upon Chesebrough's alleged trade dress or trademark rights.

Chesebrough has admitted the "diluting" effect on its pre-1989 trade dress due to Chesebrough's failure to enforce trade dress rights in the past. Pet. pp. 4-5 (see also Appendix C hereto showing pre-1989 trade dress of third parties). That same diluting effect through non-enforcement is also evident in Chesebrough's failure to take action against the third party trade dress shown in Appendices A and B hereto and in Chesebrough's admission in footnote 4 of its Petition.

Chesebrough has admitted that it uses the same color scheme on its relaunched 1989 trade dress as it did on the trade dress Chesebrough did not protect for more than twenty (20) years. Pet. p. 6. Therefore not only the bottle color (yellow) but also the colors used on the label (blue and green) constituting the "dress" of VICL have remained unaltered since use of the admittedly-unprotected trade dress employed by Chesebrough prior to 1989.

Therefore the "pre-existing goodwill" Chesebrough now asserts in its pre-1989 trade dress consists merely of unprotectable color combinations used by the private label industry in the past. Appendix C. Thus, by Chesebrough's own admission, the trade dress of the relaunched VICL is neither new nor protectable.

Chesebrough has also relied upon one (1) alleged instance of actual confusion in support of its case. That instance of alleged confusion involved a ***Target*** private label product, ***not a Venture*** private label product. Pet. App. 11a. In addition, the "confusion" witness knew that she was purchasing a private label product but presumed that the private label product came from the national brand manufacturer. Pet. App. 11a-12a.

Therefore, the witness was not confused by the Target private label product but was, instead, misled by her own thinking that all private labels are made by national brand companies. The testimony of the "confusion" witness was described by the majority as unsupported in fact, "counter-intuitive", "atypical" and "isolated", and by the dissent as "idiosyncratic and mistaken". Pet. App. 11a-12a and 30a, n. 3.

Chesebrough has asserted that the Venture name suddenly disappeared from the labels of the allegedly infringing skin care lotion bottles after the relaunch of VICL. Pet. p. 7. However, as evidenced by the photographs on page 3 and in Appendix C-1 of this Brief, the Venture name did ***not*** appear on all pre-1989 Venture private label skin care lotion products. Thus Chesebrough's assertion that there was a substantial difference between the pre-relaunch and post-relaunch Venture labels is incorrect. In addition, the Federal Circuit noted that the undisputed record demonstrates that Venture's unique "flag" logo used on its allegedly infringing trade dress is so distinctive, extensively used and widely recognized that, when combined with the absence of actual confusion, the use of Venture's logo gives rise "to the expectation that consumers identify the logo with Venture, rather than Conopco [Chesebrough], and use that logo to successfully distinguish between the two brands." Pet. App. 16a - 17a and 23a. This was one of the facts which the Federal Circuit found to be undisputed, critical to the likelihood of confusion analysis and completely overlooked by the trial court. *Id.*

Chesebrough has also attempted to demonstrate infringement by the presence of a "Compare to Vaseline Intensive Care" labelling statement on the Venture product at issue. Pet. p.7. In fact, that ***same*** statement is present on the labels of third party skin care lotions which Chesebrough now admits (in footnote 4 of its Petition) are ***not*** infringements of its trade dress and trademark rights. Appendix B-1-5. In addition, similar com-

parison statements are made on a number of similarly dressed non-infringing (per footnote 4 of the Petition) private label versions of VICL. Appendix B-1-5.

As noted by the Federal Circuit, the use of a truthful and non-confusing comparative advertising statement has long been found to be non-infringing. Pet. App. 23a-24a, *citing*, *Calvin Klein Cosmetics v. Parfums de Coeur, Ltd.*, 824 F.2d 665, 668-9 (8th Cir. 1987).

Thus the assertion by Chesebrough that the Federal Circuit in this case has "created an exception under the trademark laws for manufacturers of store brand products" (Pet. p. 10) is utterly false. The prominent use of Venture's logo and the absence of actual confusion, along with a ten (10) year history during which Chesebrough slept on its alleged rights, dispel any prospect for a likelihood of confusion between the marks and trade dress of the parties.

As noted by the Federal Circuit:

"The fact that Venture (and other retailers) compete in the manner described, which is all that the evidence establishes, is simply insufficient to amount to proof that there is in the minds of consumers a likelihood of confusion about whose product is whose." Pet. App. 17a-18a.

* * *

Chesebrough has also attempted to stretch a ***limited*** patent claim on the formulation of its "new" Vaseline Intensive Care Lotion into a realm of alleged patent "equivalents" that Chesebrough once admitted (later withdrawing the admission) was well beyond the bounds of what it envisioned in its patent. Appendix D-3.

As stated by Chesebrough, the formulation claimed in its patent has a ratio of two chemicals with a range "from about 1:1 to about 40:1". Pet. pp. 23-24. The ratio of the formulation of

those same elements used in the Venture product manufactured by Ansehl was 162.9 to 1. Pet. p. 24.

Strangely, in its argument regarding trade dress, Chesebrough has now asserted that "the lotion [in the Ansehl formulation] was of ***inferior quality*** to VICL." (Emphasis added) Pet. pp. 7-8. Thus, as was determined by the Federal Circuit, Chesebrough has now admitted in its Petition that the lotion in Venture's bottles does not satisfy the "function/way/result test" set forth in this Court's opinion in *Graver Tank & Mfg. Co. v. Linde Air Prods. Co.*, 339 U.S. 605, 608, *reh'g. denied*, 340 U.S. 845 (1950). Pet. App. 8a. In other words, Chesebrough admits on pages 7 through 8 of its Petition that the function of, and/or result achieved by, the lotion found in Venture's bottles is ***not*** the same as, and is in fact ***inferior*** to, the result achieved by the formulation found in VICL. This is the same conclusion reached by the Federal Circuit. Pet. App. 8a-9a.

II. REASONS FOR DENYING THE PETITION

A. The Decision of the Federal Circuit Is Not In Conflict With A Decision of the Second Circuit

Chesebrough has asserted that the decision of the Federal Circuit here is in direct conflict with the Second Circuit's opinion in *Oral-B Labs., Inc. v. Mi-Lor Corp.*, 810 F.2d 20 (2d Cir. 1987). Nothing could be further from reality.

In *Oral-B Labs.*, the defendant used a logo taken from the plaintiff's packaging. *Oral-B Labs.*, 810 F.2d at 21. In the present case, Venture has used its own distinctive logo on its skin care lotion bottles and this fact weighed heavily in the Federal Circuit's determination that there was no likelihood of confusion between VICL and the Venture store brand. Pet. App. 16a-17a.

In *Oral-B Labs.* the successful plaintiff asserted its trade dress infringement claim ***within six months*** after discovering the infringement. *Oral-B Labs.*, 810 F.2d at 21. In the present

case, the Federal Circuit noted that Chesebrough waited more than ten (10) years to bring its action against Venture. Pet.App. 17a.

There was no indication in *Oral-B Labs.* that the plaintiff had permitted extensive third party dilution of its alleged trade dress. In the present case, Chesebrough has admitted in its Petition that, for more than twenty (20) years, it permitted third parties to use trade dress similar to that of pre-1989 VICL. Pet. p. 4. The Federal Circuit noted that Venture's use of its private label trade dress goes back ten (10) years. Pet. App. 17a. As demonstrated in Appendices A, B and C, the dilution of both the pre-1989 and post-relaunch VICL trade dress has been extensive and significant in both scope and nature.

The list of differences between this case and *Oral-B Labs.* could go on for several pages. However, the point is clear - - trade dress and trademark actions are highly factual in nature. Each case must be reviewed in light of its unique facts. *see, Conagra v. George A. Hormel, & Co.*, 990 F.2d 368, 371 (8th Cir. 1993), *Squirtco v. Seven-Up Co.*, 628 F.2d 1086, 1091 (8th Cir. 1980)(consideration of "numerous factors" to determine likelihood of confusion). There are few trademark actions in which matters of law dominate. *see, Conagra*, 990 F.2d at 370-371. The present case is no exception to this rule.[4]

Chesebrough has attempted to create a rule under which Venture could now be enjoined from continuing to use trade dress with the unique Venture logo which it has employed in slight variations for more than ten (10) years. Chesebrough's premise for this novel new rule is the alleged "presumption . . . that intentional copying gives rise to a likelihood of confusion."

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[4] Chesebrough has also cited four district court decisions as supportive of its contention that there is a division among the Circuits created by the decision of the Federal Circuit here. Pet. p. 12, n. 9. However, since none of those prior decisions was by a Court of Appeals they do not establish the law within their respective Circuits. In addition, each decision is limited by its unique facts, none of which parallel the situation here.

Pet. p. 12. Chesebrough fails to note that the Eighth Circuit has ***not*** adopted such a rule; a circumstance which did not elude the Federal Circuit. Pet. App. 13a - 15a.

Chesebrough now relies on *Oral-B Labs.*, a Second Circuit decision, for support of its novel "presumption". Pet. p. 12. However, the facts in *Oral-B Labs.* do not include the use of a unique private label (Venture) logo or the long history of trade dress dilution which the Federal Circuit noted in the present case. (Pet. App. 16a-17a and 23a). In addition, any "presumption" of likelihood of confusion is far outweighed and rebutted by the absence of actual confusion between the Venture and VICL products over many years of concurrent sales. In all other respects, the Federal Circuit ably disposed of Chesebrough's argument that the "presumption" of likelihood of confusion should be employed here. Pet. App. 12a-15a.

B. Other Trademark and Trade Dress Arguments of Chesebrough

Much of the remainder of Chesebrough's Petition sounds themes already addressed in this Brief. Rather than belabor these points, we will respond concisely to the additional matters raised by Chesebrough:

1. Chesebrough contends that its alleged confusion witness, Mrs. Beverly Sickles, whose testimony was completely discounted by both the Federal Circuit's majority and dissent (Pet. App. 11a-12a and 30a), "mistakenly purchased the defendants' product". Pet. p.16. This is false. Mrs. Sickles purchased a ***Target*** private label product (Appendix E; see also Appendix A-1). Chesebrough now apparently asserts that the Target private label is non-infringing. Pet. p. 8, n. 4. This casts even more doubt on the relevance of Mrs. Sickles' testimony.

2. Chesebrough has condoned the use of "in-store signs inviting the consumer to 'compare'" private label and national brand products. Pet. p. 17. Chesebrough has argued through-

out this case, however, that use of such "compare to" statements on ***labels*** for Venture's skin lotion product constitutes trademark infringement. In its Petition, Chesebrough ignores the fact that ***both*** trademarks used on labels ***and*** displays associated with goods (e.g. in-store signs) are considered appropriate trademark use (15 U.S.C. §1127, "Use in Commerce"). Therefore, Chesebrough's assertion that on-label use of "compare to" statements is infringing but in-store signs are permissible is contrary to law and simply does not make sense.

3. Chesebrough maintains that the clear error committed by the trial court in finding actual confusion was an insufficient basis, standing alone, for the Federal Circuit to reverse the judgment of the trial court. Pet. p. 19-22. Chesebrough's argument overlooks both the significance of the absence of actual confusion evidence and the critical undisputed facts which the trial court ignored in reaching the finding of likelihood of confusion.

The Eighth Circuit has held that evidence of actual confusion is so important that its presence or absence is the dividing line between obtaining damages or only injunctive relief. *Woodsmith Publishing Co. v. Meredith Corp.*, 904 F.2d 1244, 1247 n. 5 (8th Cir. 1985) and *Co-Rect Products, Inc. v. Marvy! Advertising Photography, Inc.*, 780 F.2d 1324, 1329-30 (8th Cir. 1985). The absence of actual confusion evidence here was viewed by the Federal Circuit alongside critical evidence which the trial court overlooked: Venture's use of its distinctive logo and the long history of private label versions of VICL. Pet. App. 16a-17a and 22a-23a.

Therefore, contrary to the assertions of Chesebrough (Pet. 21 - 22), the present case involves clear errors of both commission and omission by the trial court, ***not*** a reweighing of evidence by the Federal Circuit. The decision of the Court in *Ives Labs., Inc. v. Darby Drug Co.*, 638 F.2d 538 (2d Cir. 1981), *rev'd*, 456 U.S. 844 (1982), relied upon by Chesebrough, which dealt with re-weighing of evidence, is inapposite. In fact, the

Federal Circuit here accepted the other findings of the trial court "as true" and did not reweigh or otherwise reevaluate them. Pet. App. 16a.

C. The Federal Circuit Did Not Undermine the Doctrine of Equivalents

The claims of Chesebrough's VICL patent limit Chesebrough's invention to a combination of certain chemicals in a ratio of "about 40:1 to about 1:1".[5] Chesebrough argues that its claimed ratio of "about 40:1 to about 1:1" can be stretched under the so-called "doctrine of equivalents" to include a ratio of 162.9 to 1, which represents Ansehl's formulation of similar chemicals sold by Venture. Chesebrough further asserts that this Court's precedent in *Graver Tank v. Linde Air Products,* 340 U.S. 845 (1950) was controverted by the Federal Circuit's determination that "about 40:1 to about 1:1" is not equivalent to 162.9 to 1. Pet. pp. 23-25.

The doctrine of equivalents is an equitable doctrine which comes into play only in cases in which there is an absence of literal infringement. Pet. p. 24. In this regard, it should be noted that Chesebrough has not sought review of the Federal Circuit's reversal of the trial court's determination of literal infringement. See, Pet. App. 5a-8a.

The doctrine of equivalents evaluates the alleged infringement in terms of whether the defendant's product performs the same function in the same way and accomplishes the same result as the

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[5] Claim 1 of United States Patent No. 4,939,179, the only independent claim, reads as follows:

> 1. An aqueous cosmetic emulsion comprising:
>
> i) an isoparaffin;
>
> ii) a C_8 - C_{22} alkyl phosphate salt; wherein the isoparaffin and alkyl phosphate salt are present in a respective weight ratio of from about 40:1 to about 1:1, and said emulsion having a viscosity ranging from 35 to about 90 Brookfield units as measured with a Brookfield Viscometer Model LVT using a #4 spindle rotating at 60 rpm at 25°C.

alleged invention. *Graver Tank*, 339 U.S. at 608. However, the doctrine of equivalents cannot be used to erase "meaningful structural and functional limitations of the claim on which the public is entitled to rely in avoiding infringement." Pet. App. 8a, *citing Pennwalt Corp. v. Durand-Wayland, Inc.*, 833 F.2d 931, 935 (Fed. Cir. 1987)(en banc), *cert. denied*, 485 U.S. 1009 (1988) and *Graver Tank*, 339 U.S. at 610.

Chesebrough asserts that the formulation contained in Venture's product is "of inferior quality to VICL". Pet. p. 8. Chesebrough fails to explain how a chemical formulation can be ***both*** infringing under the doctrine of equivalents (i.e. satisfies the function/way/result test) ***and*** at the same time ***inferior*** to the patented product.

It should be noted that the Federal Circuit was unanimous in rejecting the "logic" of Chesebrough in relation to the application of the doctrine of equivalents. The Federal Circuit's determination was based upon the plain wording of the patent claim at issue as well as:

(a) The fact that the inventors emphasized the critical importance of the claimed ratio in achieving the alleged "synergistic" increase in viscosity of VICL represented by the patented invention (Pet. App. 6a-7a);

(b) The inventors indicated in their patent specification that the optimal ratio for incorporating the chemical elements involved to achieve the desired "synergism" was "between 10:1 and about 6:1" Pet. App. 6a. Thus lower (e.g. 10 to 1), rather than higher (e.g. 162.9 to 1), ratios are more desirable in achieving the favorable results of the invention.

(c) Chesebrough admitted (and later withdrew its admission) that "a ratio greater than 150:1 to 1:1 is ... outside the scope of the claims." Appendix D-3.

Therefore, by Chesebrough's own admission of the "inferior" nature of the alleged infringing product, the clear meaning

of the patent claims, the criticality of the ratio of chemicals set forth in the patent claims and the emphasis Chesebrough placed on lower (rather than higher) ratios, infringement through the doctrine of equivalents is not present here.

CONCLUSION

In summary, this case does not involve a division of opinion between Circuits, nor a clear error of law, nor does the decision of the Federal Circuit impose any fundamental unfairness on Chesebrough. This case simply does not have the import of a matter justifying the attention or resources of the United States Supreme Court.

Respectfully submitted,

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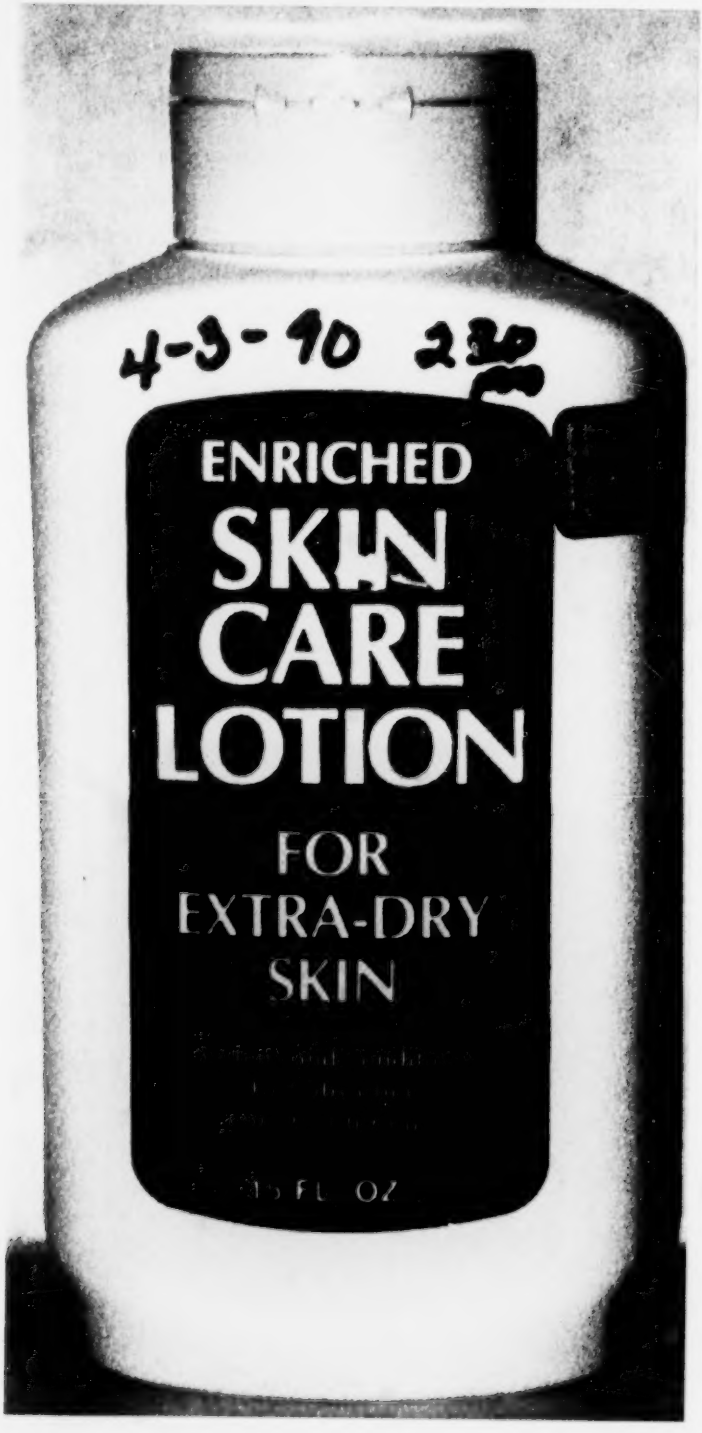

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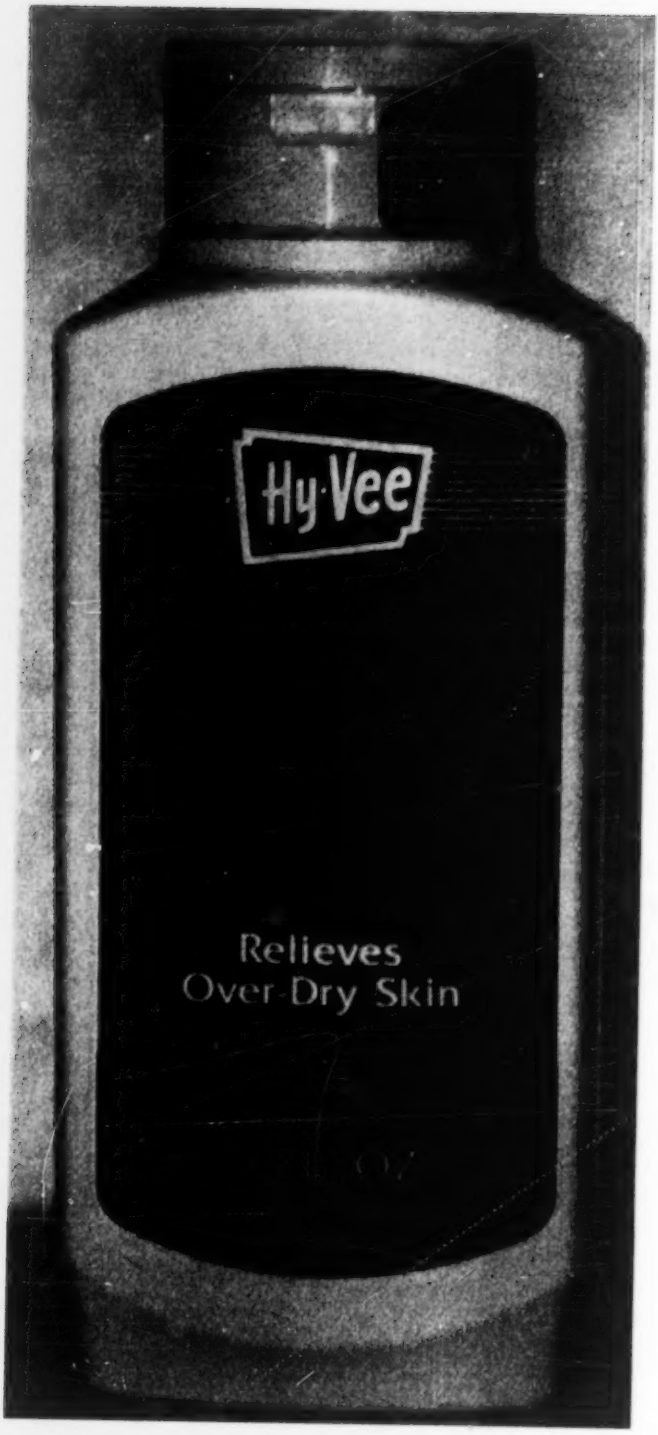

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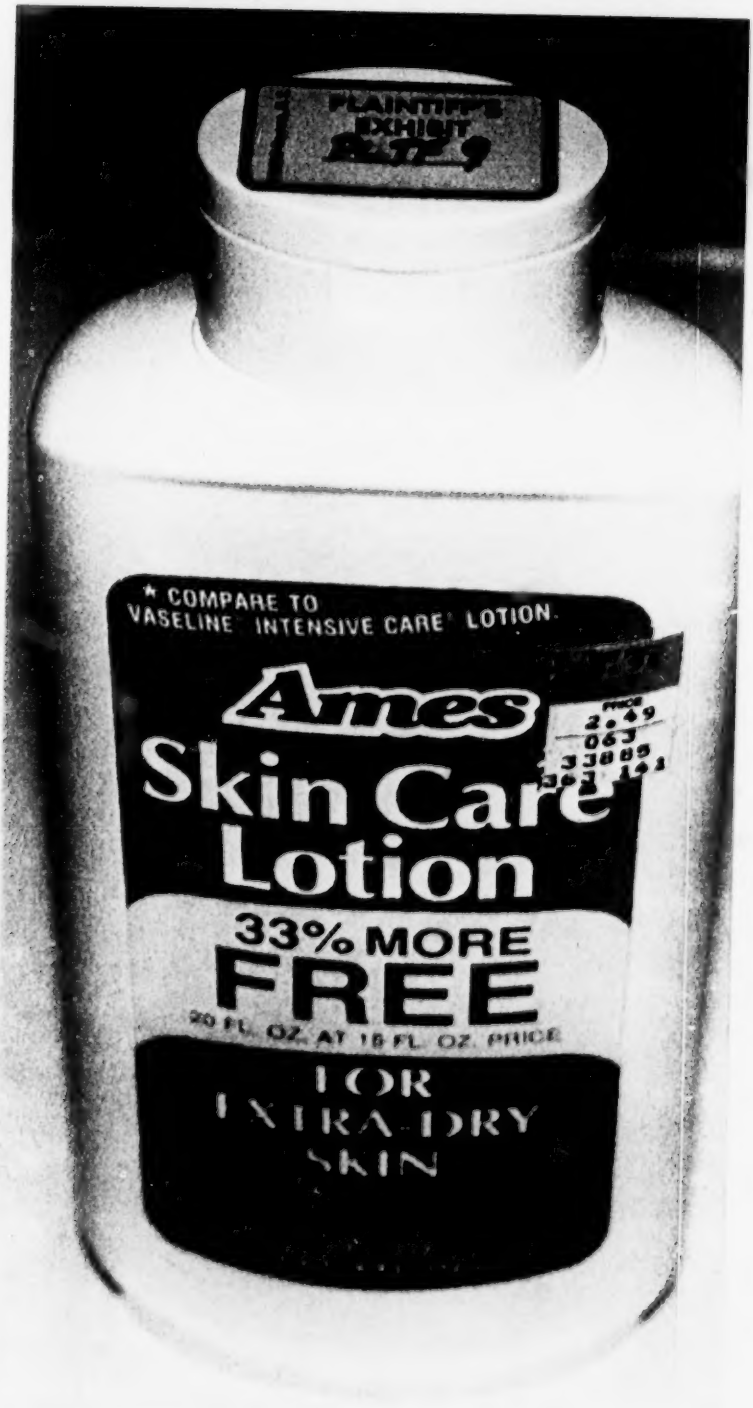

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OVER-DRY
SKIN

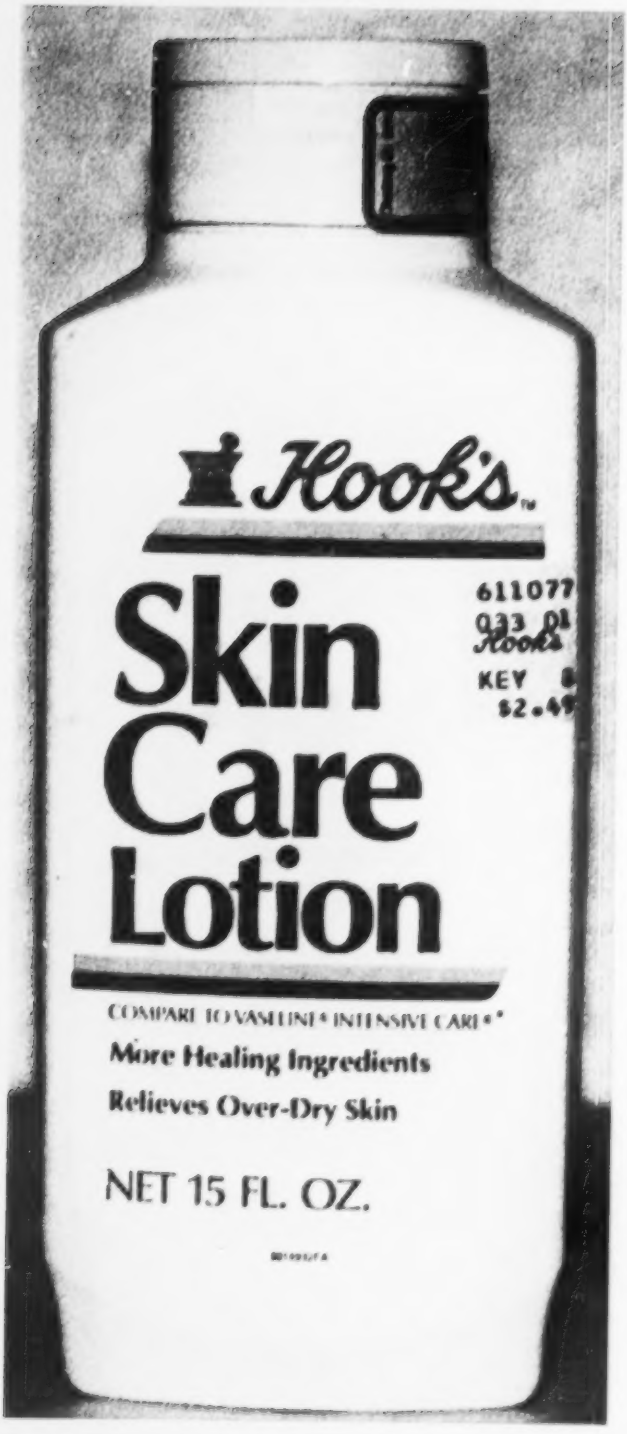

GIANT
Skin
Care
LOTION
RELIEVES
OVER DRY
SKIN


STOP & SHOP
SPECIAL
CARE
LOTION
HELPS HEAL
VERY
DRY SKIN


SKIN
CARE
LOTION
GRAND
UNION
443 ml


PLAINTIFF'S EXHIBIT
* COMPARE TO VASELINE INTENSIVE CARE LOTION
Ames
Skin Care Lotion
33% MORE FREE
20 FL. OZ. AT 16 FL. OZ. PRICE
FOR EXTRA-DRY SKIN


SAFEWAY
SKIN CARE
LOTION
Relieves Over-Dry Skin
Compare to Vaseline® Intensive Care™ Lotion*
15 FL OZ (444 ML)


Hook's™
611077
933 01
Hook's
KEY
$2.49
Skin Care Lotion
COMPARE TO VASELINE® INTENSIVE CARE®*
More Healing Ingredients
Relieves Over-Dry Skin
NET 15 FL. OZ.


COMPARE TO THE INGREDIENTS OF VASELINE INTENSIVE CARE
Brite-Life
MORE HEALING INGREDIENTS
Skin care
LOTION
RELIEVES OVER-DRY SKIN
15 FL. OZ. (444 ml)


Chopp
GENERAL MOSE
$2.39
Skin Care
Lotion
NET 15 FL. OZ. (444 ml)

C - 1


DEFENDANT'S
EXHIBIT
II-1
Skin Care
Lotion
Feels soothing on chapped
and dry skin - Non Greasy


33% MORE
FREE
15 FL. OZ. PLUS 5 FL. OZ. FREE
SkinCare
Lotion
FOR EXTRA-DRY SKIN


DEFENDANT'S
EXHIBIT
11-32
Special
$1.99
Walgreens
professional
care lotion
smooths and
softens
dry chapped
skin


2/1/91
12:40
$2.29
Natural
Care
Lotion
Softens
Dry Skin


DEFEND.
EXHIB.
H-30
Payless
Skin
Care
LOTION
HELPS SOFTEN DRY SKIN


LOTION
FOR EXTRA-DRY SKIN
Feels soothing on chapped
and dry skin - Non Greasy
15 FL. OZ.
Distributed by
CALDOR INC.
Norwalk, Conn. 06852


DEFENDANT'S
EXHIBIT
11-29
Revco
Skin
Care
LOTION
15 FL. OZ.


RITE
AID
ENRICHED
Skin
Care
Lotion
FOR
OVER-DRY
SKIN
OZ


EXHIBIT
11-28
PERRY
BeautyCare
Skin
Care


DEFENDANT'S
EXHIBIT
3-31
Skin
Care
LOTION
Relieves Over-Dry Skin
ShopKo
15 FL. OZ. (444ml.)

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Civil Action No. 90-1475-C-3

CONOPCO, INC., doing business as
CHESEBROUGH-POND'S USE CO.,

Plaintiff,

v.

MAY DEPARTMENT STORES COMPANY,
VENTURE STORES, INC.,
THE BENJAMIN ANSEHL COMPANY, and
KESSLER CONTAINERS LTD.,

Defendants.

Plaintiff's Amended Response To Defendant, The Benjamin Ansehl Company's, First Set Of Requests For Admissions

---

Pursuant to Rule 36 of the Federal Rules of Civil Procedure, plaintiff, Chesebrough-Pond's USA Co. ("Chesebrough"), hereby objects and responds to defendant, The Benjamin Ansehl Company's ("Ansehl") First Set of Requests For Admissions, follows:

General Objections

1. Chesebrough objects to Ansehl's Requests For Admissions on the grounds that Ansehl has resorted to combing through the prosecution file history of Chesebrough's United States Patent No. 4,939,179 and framing its requests to elicit not the authorship and authenticity, but the contents and meaning of the individual papers contained in that public record which is open for all to read. Those components papers of the prosecution file history of the patent in suit speak for themselves and

are improperly made subjects of requests for admissions pursuant to Rule 36 of the Federal Rules of Civil Procedure in that such prosecution file history can be fully authenticated by obtaining a certified copy of such document from the United States Patent and Trademark Office.

2. Chesebrough objects to Ansehl's Requests For Admissions on the grounds that it seeks to discover information with respect to whether prior art patents contained in the prosecution file history of the patent in suit demonstrate a proper and sufficient disclosure of scientific information to a cosmetic chemist skilled in the art. Such requests for admission are an improper method of discovering the information sought which can more properly be obtained through the testimony of expert witnesses who can inform the Court what in fact the nature of the disclosure would be to a cosmetic chemist skilled in the art and whether such disclosure was sufficient in law under 35 U.S.C. § 112.

3. Chesebrough objects to Ansehl's Requests For Admissions insofar that it seeks information that is irrelevant, immaterial and not reasonably calculated to lead to the discovery of admissible evidence.

4. Chesebrough objects to Ansehl's Request For Admissions insofar as it is vague, ambiguous and broad and seeks admissions or denials by Chesebrough concerning misquoted portions of the claims of the patent in suit and incorrect and confusing paraphrases of portions of the specification of the patent in suit. As a result, many of defendant's requests are unintelligible and unanswerable.

Specific Responses

Without waiver of any of the above general objections, Chesebrough answers the following requests as follows:

REQUEST FOR ADMISSION NO. 23

That the use of insoparaffins and alkyl phosphate salts in a ratio greater than 150:1 to 1:1 is [sic] a cosmetic emulsion is outside the scope of the claims of U.S. Patent 4,939,179.

AMENDED RESPONSE TO REQUEST NO. 23

Admit

Dated: November 13, 1990

MOLINE, OTTSEN, MAUZE,
LEGGAT & SHOSTAK

By: /s/ Harry O. Moline

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D - 4

THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI

Civil Action No. 90-1475-C-3

CONOPCO, INC., d/b/a/
CHESEBROUGH-POND'S, USA CO.,

Plaintiff,

v.

THE BENJAMIN ANSEHL CO., et al.,

Defendants.

Defendants Memorandum In Opposition To Plaintiff's Motion To Amend Its Answer To Request For Admission No. 23 Pursuant To Rule 36(b) Fed. R. Civ. P.

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I. INTRODUCTION

Plaintiff Conopco, Inc. (Conopco) seeks leave to amend its first amended response to Defendant, The Benjamin Ansehl Company's (Ansehl's) Request for Admission No. 23, in which it admitted that a skin care lotion having a ratio of isoparaffin and alkyl phosphate salt ("salt") greater than *150:1* is not covered by the claims of the Cheney et al. patent in suit. This admission *conclusively establishes* that the lotion made and sold by Ansehl since the issuance of the Cheney et al. patent at a ratio of *162:9:1*, is non-infringing.

To justify the withdrawal of this key admission, Canopco claims that "its proposed amendment to Admission Request No.23 is proper because its present answer was based on an erroneous assumption" that Ansehl had *increased* the level of isoparaffin in its lotion, rather than *decreased* the concentration of salt it contained. Canopco's Memorandum in Support, p.8. Canopco claims that it *incorrectly assumed* Ansehl increased the leval of isoparaffin to 37.5% of the lotion and therefore tested a base lotion containing that amount of isoparaffin. Canopco's Memorandum in Support, p.4; Ex. A thereto (March 4th Ghosh Decl.), ¶¶ 4,7, and 10 (Reprinted at Appendix B attached hereto). This claim lacks credibility.

In reality Conopco's motion is nothing less than a brazen attempt to tailor its interpretation of the claims of the Cheney et al. patent to coincide with the actual formulation of Ansehl's lotion, now that it has learned the actual formulation. This belated motion, offered on the eve of submission to the Court for final decision of Defendants Motion for Partial Summary Judgment as to patent infringement, should be rejected for the following reasons:

1) Conopco's claim that it based its admission on an erroneous assumption is inconsistent with the facts.

2) Conopco has not and cannot justify waiting until the eleventh hour to seek this amendment. Conopco received Ansehl's production records over four months ago, the *day after* its admission was served on Ansehl.

3) Canopco's "new" evidence is virtually identical to the "old" evidence relied upon by Conopco to admit Request No. 23.

4) Should Conopco be permitted to withdraw its admission at this late date, the removal of the conclusive establishment of noninfringement provided by Conopco's admission will greatly prejudice defendants who, in the exercise of prudence, will be forced to expend precious time and effort to pursue expedited discovery on all patent issues prior to the discovery cutoff less than 100 days away.

Granting Conopco leave to withdraw its admission of Request No. 23 on the purported grounds presented by it in its motion would be a *disservice* to a fair presentation of the merits of the case and would greatly prejudice the Defendants if granted. Defendants, therefore, respectfully urge that it be rejected. In the alternative, should Conopco be permitted to withdraw its admission at this time, Defendants ask this Court for the expenses and fees occasioned by its reliance on Conopco's original admission.

II. BACKGROUND

Defendants served Conopco with requests for admissions on September 14, 1990. Twenty days later, on October 4, 1990 Conopco served document requests on defendants, requesting, *inter alia,* Ansehl's production records. On November 8, 1990, counsel for Conopco sent a facsimile to Defendants' counsel stating Conopco's position that it need not respond to certain requests until after it had learned of Ansehl's product formula-

tion (Ex. 1, p. 2,¶1 attached). Ansehl filed a Motion for Protective Order in order to ensure that Conopco's admission or denial of Request No. 23 was not tainted by knowledge of Ansehl's product formulation.[1] Ansehl sought a Protective Order providing formulation until Conopco answered Request No. 23 (Ex. 2, attached)[2] . Ansehl, however, withdrew this motion (Ex. 5, attached) when Conopco agreed to the discovery sequence sought to be maintained by the proposed order and answered Request No. 23 (Ex. 3, attached). The parties filed a joint stipulation with the court reflecting that the discovery dispute had been resolved by Conopco's acquiescence in Ansehl's proposed sequence of discover. (Ex. 6, attached). Conopco admitted request no. 23, Ansehl revealed its skin care formulation that same day (Ex. 4, p. 2, ¶1 attached), and now, four months later, Conopco seeks to change its admission to essentially a denial on the asserted basis that Ansehl's revelation of its formulation exposed an erroneous assumption on which Conopco had based its original admission. A chronological list of events in this case is attached hereto as Appendix A.

III. CONOPCO'S POSITION

Conopco's fundamental supposition is that the "the unique interaction" of isoparaffin and salt[3] "substantially increases

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[1] As explained in Ansehl's Memorandum in Support of its Motion for a Protective Order, Request No. 23 is directed to Conopco's position as to the *scope* of coverage of the claims to the Cheney et al. patent, not to whether Ansehl's lotion infringed those claims. As such, the actual formulation of Ansehl's lotion was *immaterial* to the request, contrary to Conopco's present assertions.

[2] Ansehl feared, as it turns out, legitimately, that Conopco would attempt to tailor its response as to the scope of the Cheney, et al. patent, to fit Ansehl's actual formulation, if Conopco were permitted to peruse Ansehl's production records prior to making its response.

[3] The Cheney et al. patent also argues the criticality of the ratio of about 40:1 to 1:1 of isoparaffin to salt to achieve enhanced viscosity. Conopco is

viscosity" for skin care lotions to a level of 35 to about 90 Brookfield Units[4], a viscosity level deemed to be consumer acceptable in the Cheney et al. patent. February 15th Ghosh Declaration, ¶15, March 4th Ghosh Declaration, ¶13. Conopco claims that in order to respond to Ansehl's Request No. 23, it increased the level of isoparaffin in a generic or "base" lotion[5] to 37.5% of the total lotion and measured the resulting viscosity. Since the viscosity of the base lotion containing 37.5% isoparaffin and 0.25% salt only registered a viscosity of 32.7 (See Ex. 1, p.3 to the March 4th Ghosh Decl.), Conopco admitted that a lotion with a ratio of 150:1 is not covered by its patent claims.

Rule 36(b) provides for withdrawal of admissions only where "the presentation of the merits will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice that party in maintaining the action . . . . " This is an "exception to the rule", *Donovan v. Carls Drug Co., Inc.* 703 F. 2d 650, 652 (2d Cir. 1983) (Denial of request to retract admissions; affirmation of summary judgment based on those admissions.) and is generally allowed in those situations where the admission is made through inadvertence or mistake. 4A J. Moore, J. Lucas & D. Epstein, Moore's Federal Practice ¶ 36.08 (2d Ed. 1990).

In order to fit within this exception, Conopco argues that its admission was based on the erroneous assumption that "defendants had increased the isoparaffin level of its product and

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essentially attempting to "read out" of the patent any mention of or requirement for this specific ratio.

[4] Under certain designated test conditions recited in the Cheney et al. claims.

[5] The base lotion used by Conopco to test for ratios of 50:1 through 150:1 is the *same* "base formula" shown in Example 1 of the Cheney et al. patent and used throughout the examples contained in the Cheney et al. patent. See Cheney et al. patent, columns 4-7 attached hereto as Appendix C.

had kept constant the level of alkyl phosphate salt (Ghosh Dec1.¶7)." Conopco's Memorandum, p.4. [6]

Conopco goes on to argue that it was only after reviewing Ansehl's production records that it realized it had made an erroneous assumption. "Thereafter, Ansehl produced its production records to Chesebrough. Chesebrough sent these records to its technical expert, Dr. Ghosh, who, upon reviewing these documents, realized for the first time, that Ansehl had achieved the 162.9:1 ratio by holding the level of isoparaffin constant and by substantially reducing the level of alkyl phosphate salt." Conopco's Memorandum, p.5. Conopco claims that it thereupon retested its base lotion using the lowered level of slat shown by Ansehl's records, and also tested Ansehl's exact formula of lotion which uses a 162.9:1 ratio of isoparaffin to salt. These test results are reflected at Ex.2 to the March 4th Gosh Decl., last two rows reflecting "2I, .0123 Amphisol(salt)". When tested, the base lotion with lowered salt content registered a viscosity reading of 31 and the Ansehl lotion a reading of 54.3. See Ex. 2 of the March 4th Ghosh Decl. Conopco argues that these new tests show that "Ansehl used the teaching of Claim 1 of the '179 patent, namely, the interaction of isoparaffin and alkyl phosphate salt to produce the significant increase in viscosity levels." Conopco's Memorandum, P.6,

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[6] Among the many items left unexplained by Conopco is why *initially* it failed to test a lotion in which the *150:1* ratio was produced by lowering the level of salt in addition to its test in which it raised the level of isoparaffin. It does not require a Ph.D. in chemistry to recognize that a relative ratio of 40:1 can be changed to 150:1 either by raising the content of one ingredient or by lowering the content of the other. Certainly disclosure of Ansehl's formula was not necessary for Conopco to obtain this obvious insight.

IV. CONOPCO'S MOTION SHOULD BE DENIED

A. Conopco's claims do not withstand scrutiny

Contrary to Conopco's assertions, Conopco could not possibly have assumed that "Ansehl had increased the amount of isoparaffin to . . . 37.5% (where the ratio is 150:1)." March 4th Ghosh Decl. ¶10. As Conopco is well aware, use of this level of isoparaffin is unstable and unsafe. Moreover, as shown by *Ansehl's product label, Ansehl's use of this level of isoparaffin would be physically impossible.* These facts, and Conopco's awareness of them, are already disclosed in the record.

As testified to by Dr. Ghosh, use of 37.5% isoparaffin literally causes the lotion to fall apart. ". . . where the amount of isoparaffin is unusually high; specifically, thirty-seven point five with the Amphisol (salt) at point two five, you get a physical instability of the emulsion (lotion)." Ghosh Depos. transcript, p.136. Appendix D. attached. Conopco could not possibly have "assumed" that Ansehl's lotion contained a physically unstable level of isoparaffin.

Similarly, Conopco knew that use of that level of isoparaffin was *literally unsafe* and could not possibly have been utilized by Ansehl. As stated by Dr. Ghosh in his March 4th Declaration, "Isoparaffin is a volatile (explosive) hydrocarbon which tends to destabilize oil and water emulsions. Also, by substantially increasing the levels of isoparaffin, there is a possibility that the lotion can be unsafe to human skin." March 4th, Ghosh Decl., ¶8.

Finally, Conopco was well aware that Ansehl's use of the 37.5% isoparaffin was a *physical impossibility* in light of Ansehl's product label.[7] As stated by Dr. Ghosh in his February 15th Declaration, ¶6: "through experience, I have learned that

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[7] A copy of Ansehl's skin care lotion label is attached at Appendix E.

packaging for health and beauty aid products must bear a list of ingredients *in descending order of content . . .*"(Emphasis added.) As reflected on Ansehl's label, isoparaffin *is listed fourth.* Therefore, each item listed above isoparaffin on Ansehl's label would be included at the level of 37.5% or greater if Conopco's "assumption" were to be given credence. Thus, Conopco would have the Court believe that it assumed Ansehl's lotion had a level of isoparaffin which results in a total composition of at least 150% (37.5% X 4), even if every other ingredient below isoparaffin were eliminated.[8] No product can contain greater than 100% total content. Hence, Conopco's assertion lacks even facial credibility.

In short, Conopco has clearly manufactured an "error" based on an unnecessary "assumption" in the hope that the Court will relieve it of an admission that eliminates any hope of finding infringement at the ratio of isoparaffin to salt actually used by Ansehl. This charade should be firmly rejected.

B. Conopco has not and cannot justify its delay

As shown by Ex. 4 attached, Ansehl sent its production records to Conopco by Federal Express *on November 13th, the same day* Conopco admitted Request No. 23. Thus, Conopco received Ansehl's formula the day after making its admission. Any "erroneous assumption" as to Ansehl's composition was therefore immediately made apparent by Ansehl's production records. Conopco has not and cannot justify why it delayed over four months until the eve of the final submission of Ansehl and Venture's Summary Judgment Motion to attempt to withdraw its admission. Dr. Ghosh admits that *he personally reviewed* Ansehl's production records in January, 1991. March 4th Decl., ¶10. Cocopco's unjustifiable delay can only have been calculated to give Ansehl the minimum amount of time before sub-

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[8] For the same reason, Conopco was aware that Ansehl could not have used 25% isoparaffin, the level it tested for its 100:1 ratio of ingredients.

mission of its Summary Motion to the Court for final decision and prior to the discovery cutoff to react and respond to the possible elimination of the "conclusive establishment" of non-infringement provided by Conopco's admission to Request No. 23.

Conopco's attempt to tailor the scope of its patent claims to fit the actual composition used by Ansehl and to maneuver a tactical advantage by unjustifiably delaying the filing of its motion to amend until the last minute amounts to an abuse of the rules of discovery and should be rejected.

C. Conopco's "new"evidence is virtually identical to the "old" evidence.

When Conopco tested its based lotion used in its patent with isoparaffin at a level of 37.5% [9] , it registered a viscosity of 32.7, which was rejected as outside the claimed range of 35 to about 90 shown in claim 1 of the Cheney et al. patent. When Conopco retested its base lotion with isoparaffin held constant and salt levels reduced to .0123%, the level actually used by Ansehl, *it registered a viscosity of 31.*[10] Thus, when the identical levels and ratio of isoparaffin and salt used by Ansehl were inserted in the lotion tested by Conopco in its patent, the resulting viscosity was lower, not higher, than the 32 rating Conopco had previously achieved in using a supposedly "erroneous" level of isoparaffin. The rating was also *clearly outside* the scope of 35 to 90 claimed by Conopco. Thus, Conopco asks the Court to relieve it of an admission on the basis of test results which actually *confirm* its earlier admission.

Moreover, Conopco unwittingly conducted a controlled experiment that unequivocally demonstrates that it is *not* the

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[9] Page 3 of Ex. 1 to the March Ghosh Declaration.

[10] See Ex. 2 to March 4th Ghosh Decl., "2I.0123Amphisol(salt), Base Lotion.

"unique interaction of isoparaffin and salt" at Ansehl's actual ratio of 162.9:1, which causes the "enhanced viscosity" of Ansehl's product. Conopco did so by testing the viscosity of Ansehl's *actual formula* (including 2% isoparaffin and .0123 salt) and comparing it to its patent's based lotion (also including exactly the same 2% isoparaffin and .0123% salt). See "Base Lotion" and "VICL Copy" (sic) test results at 162.9:1 I to Amphisol (salt) shown at Ex. 2 to Ghosh's March 4th Declaration. While the base lotion only registered an unacceptable viscosity of 31, the actual Ansehl formula registered a robust 54.3. Necessarily, therefore, the dramatic increase in the viscosity of the Ansehl lotion is caused by *something other than* the "unique interaction" of isoparaffin and salt, since these were used in identical amounts and ratios in both formulations.[11]

Since Conopco's new test results do not materially differ from those relied upon for its earlier admission supposedly made under an erroneous assumption, and since they actually demonstrate that the "unique combination" of isoparaffin and salt at these levels is not the cause of Ansehl's enhanced Viscosity, Conopco should not be permitted to withdraw an admission contrary to its own submitted evidence.

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[11] This test precisely complements those conducted by Sol Benkendorf in which the *complete removal* of salt from Ansehl's formulation has *no effect* on the viscosity of the skin care lotion. See Decl. of Sol Benkendorf attached as Ex. 3 to Ansehl's Memorandum in Support of Summary Judgment, ¶¶6-7. Conopco's assertion that the relative viscosities of lotions containing isoparaffin and salt vs. mineral oil and salt shows that the *combination* of isoparaffin and salt at these levels enhances viscosity is a non-sequitur. In the Cheney et al. patent, Conopco's base lotion containing mineral oil *without* salt and isoparaffin *without* salt achieved *virtually identical* viscosities (19.5 vs. 19; 32 vs. 31, respectively) as the viscosities shown by Conopco testing the same base lotion with .0123% salt. See Cheney et al. patent, Appendix C attached, Table VIII. At these levels, isoparaffin simply produces more viscosity than mineral oil regardless of the presence of salt in the lotion.

D. Amendment of Conopco's admission will greatly prejudice defendants.

Conopco claims Ansehl will not be prejudice since it has not even deposed Conopco's personnel concerning the patent issue. Conopco's Memorandum, p.9 Conopco's assertion misses the mark. Ansehl had not previously conducted depositions regarding the patent issues because Conopco's admission *conclusively established* that a lotion using the ratio actually employed by Ansehl is noninfringing. While Ansehl has presented solid evidence that its use of isoparaffin and salt at a ratio *more than four times* the ratio claimed in the Cheney et al. patent is non-infringing, the removal of the conclusive effect of Conopco's admission to Request No. 23 means than in the exercise of reasonable prudence, Ansehl must attempt to fully develop its patent case, including open questions concerning the validity of the Cheney et al. patent, with only slightly more than 90 days remaining before the discovery cutoff on June 22. Conopco cannot begin to claim that having to complete discovery on a patent infringement cause of action under such time constraints will not prejudice Defendants.[12]

Similarly, granting Conopco leave to withdraw its admission cannot help but disrupt the orderly consideration of Defendants' Motion for Summary Judgment, already submitted to the Court for final decision. Conopco's only argument against summary judgment as to patent infringement is its insupportable assertion that production records showing Ansehl used a 40:1 ratio in February, 1990, somehow establish infringing manufacture or sale after July 3, 1990 when the Cheney et al. patent issued. (Conopco's Memorandum, p.10.) If Conopco seriously believes that its withdrawal of its admission is immaterial to the

[12] Defendants will of course be pressed to adequately complete preparation of their case for the patent claim. More importantly, valuable time and effort which would have been devoted to other issues will be lost.

Summary Judgment Motion, Defendants *invite* Conopco to stipulate that its admission to Request No. 23 will remain in force for purposes of the Court's ruling on the Summary Judgment Motion.

Defendants' prejudice resulting from withdrawal of the conclusive establishment of non-infringement provided by Conopco's admission to Request No. 23 is both real and clear from the record. Accordingly, Conopco's attempt to reap an unjustified tactical advantage at the eleventh hour should be denied.

V. ALTERNATIVE REQUEST FOR EXPENSES

In the event that the Court permits Conopco to withdraw its admission of Request No. 23, Defendants request that they be given ten (10) days to move the Court for an award of expenses incurred as a result of Conopco's belated motion. Defendants should be reimbursed for their fees and expenses that would not have been incurred but for Conopco's admission and Defendants' reliance on the facts contained therein as "conclusively established." Fed. R. Civ. P. 36(b). In *Howard v. Sterchi,* 725 F. Supp. 1572, 1577 (D.Ga. 1989), relied on by Conopco in its supporting memorandum, the court granted such leave to file for expenses in a similar situation because "the plaintiffs indeed were dilatory in failing to move for withdrawal at an earlier time." The court, after granting the motion to amend, stated:

> "The court, however, is aware that the defendants detrimentally relied upon the earlier admissions in preparing their motion for summary Judgment . . . Accordingly, the court permits them 10 days in which to move for expenses and fees occasioned by their reliance on the original admissions."

Id. As set out above, Defendant's relied on the admissions in preparing their motion for partial summary judgment. Defen-

dants should at least be reimbursed for costs associated with Conopco's belated motion to withdraw.

IV. CONCLUSION

As detailed above, Conopco's purported justification for withdrawing its key admission to Request No. 23 is unsupportable, its attempted withdrawal has been unreasonably delayed, its "new" facts in reality support the original admission, and withdrawal of the motion will clearly prejudice the defendants in the further prosecution of their defense. In fairness, the motion to amend Request No. 23 should be denied.

Respectfully submitted,

/s/
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G.Harley Bloser
SENNIGER, POWERS,
LEAVITT & ROEDEL
One Metropolitan Square,
16th Floor
St. Louis, Missouri 63101
(314) 231-5400

APPENDIX E

A. Uh-huh.

Q. — complaining about the fact you couldn't get the cap off Plaintiff's Exhibit 3. And did you get an answer?

A. Yes, I did.

Q. And what did the answer tell you?

A. They were sorry I was having—more or less they were sorry I was having problems getting the cap off, and they sent me a $ 3 check to pay for a new bottle of lotion and a couple of coupons.

Q. Okay. Did they tell you anything about how much was filled into the new bottle?

A. Yes. They put a little extra in so that people didn't have to worry if they didn't get it all drained out.

Q. But you still wanted it all out, is that right?

A. Oh, you bet.

Q. And you used to cut the bottles, you say?

A. Right.

Q. Now, Mrs. Sickles, did there come a time when you purchased another product, a skin care lotion? And let me ask you did it look anything like this exhibit, which is Plaintiff's Exhibit 12?

A. Yes, sir.

Q. And where did you make that purchase?

A. I made it at Target store.

Q. Target.

MR. CLARK: Judge, could I — could the record show a continuing objection to testimony about the Target bottle, which is not part of this case, as opposed to the Venture bottle?

THE COURT: The record will so reflect.

BY MR. TERZIAN:

Q. I'm sorry. I didn't hear you last answer, Ms. Sickles. Where did you purchase it?

A. Target store.

Q. Target store. You were in a Target store. In Iowa?

A. That is correct.

Q. Was it in Cedar Rapids?

A. In Cedar Rapids, uh-huh.

Q. Okay. How was that bottle displayed in the store? And in that connection I'll hand you back Plaintiff's Exhibit 3.

A. Okay. So that you can see how it was done, they were side by side in the store.

Q. Uh-huh.

A. And underneath the Target one they had a side—sign that said, "Compare the quality and the price."

Q. I see.

A. And it was on sale. That was the reason I went into the store that day. It happened to be on sale.

THE COURT: Counsel, now, I have an objection which is continuing, and I'm not too clear how evidence as to how it's displayed, the Target bottle and so on and so on in Cedar Rapids can have an effect on what involves the Venture bottle.

MR. TERZIAN: Well, your Honor, the Target product is a product of the Benjamin Ansehl Company.

THE COURT: Yes.

MR. TERZIAN: It's one of their customers. They've supplied it to them. And that bottle was purchased by the witness, and she experienced certain things when she made that purchase.

THE COURT: You're saying it's applicable to Ansehl?

MR TERZIAN: That's correct, your Honor, absolutely.

THE COURT: Proceed.

BY MR. TERZIAN:

Q. You said it was displayed side by side, and there was a sign that said, "Compare and save"?

A. That is correct.

Q. And there was a price difference?

A. Yes.

Q. What was that difference?

A. Almost a dollar.

Q. Okay. So you decided to buy the Target?

A. Well, because I felt that since they were side by side that it might be a cheaper brand of Vaseline Intensive Care, which I have used all these years.

Q. Okay. What led you to that thought at the time you made the purchase?

A. Bottles are similar. I looked in the back, and what they had contained was similar.

Q. You compared the ingredients?

A. That is correct.

Q. Okay. So your belief —

A. So I decided to try it.

Q. And you had this belief that you were purchasing something made by Vaseline Intensive Care?

A. That is correct.

Q. Had you ever had that kind of experience with other consumer products, Mrs. Sickles?

A. Well, yes, you know, like you buy Del Monte vegetables, and they make vegetables for other companies under a different brand. And they're cheaper, and they're generally not as good a quality. But I didn't — you know, I thought, "Well, what can you do to lotion?"

Q. Yeah. So you thought you'd give it a try?

A. Right.

Q. Did you take the Target bottle home?

A. Yes, I did.

Q. Did you give it a try?

A. Yes, I did.

Q. What did you find?

A. I didn't like it because it was watery.

Q. Compared to?

A. Compared to Vaseline Intensive Care.

Q. I see. Well, what did you do with the Target bottle?

A. Well, I set it by the kitchen sink because I can't throw anything away and used it after I washed dishes.

Q. And only after that, is that right?

A. That's correct.

Q. And did you go back to using Vaseline Intensive Care —

A. Yes, I did.

Q. — on the rest of your body?

A. Yes.

Q. Now, did you receive a telephone call after you made the Target purchase —

A. Yes, I did.

Q. — from a Chesebrough representative?

A. That is correct.

Q. And basically what happened at that time?

A. And I told them how unhappy I was about — and how I felt that the Target was made by Vaseline Intensive Care.

Q. And you said you were unhappy about it?

* * *

Representative?

A. That is correct.

Q. Okay. It there anything else you can add, Mrs. Sickles, to what happened when you brought the Target product?

A. Well, I guess as a consumer I kind of feel if you're going to have a product, you don't need to send — set it side by side with another one. I probably would have bought this if it had even been in another part of the store because it was on sale and I felt Vaseline Intensive Care actually made it. Even if it had been setting over here on a shelf and this one had been setting here —

Q. Why would you believe if it was separate from it that it was made by Vaseline Intensive Care?

A. Because of the shape of the bottle and the ingredients on the back. They are similar.

Q. And you found out you were going?

A. That is correct.

MR. TERZIAN: No further questions, your Honor.

THE COURT: You may cross- examine, Mr. Clark.

THE CLERK: Thank you, Judge.

CROSS-EXAMINATION

BY MR. CLARK:

Q. Ms. Sickles, I represent the Defendants in this case. We haven't met before, have we —

A. No.

Q. — or spoken?

A. No sir.

Q. The product you bought that you gave testimony about was from Target as opposed to Venture, is that correct?

A. That is correct, sir.

Q. And at the time you bought the product, you knew it had the Target logo on it, is that —

A. Yes, sir.

Q. It was just a question of not — being confused as to who might have made the product?

A. That is correct.

Q. Okay. Did you look on the bottle on the back to see who might have made it?

A. No, I did not. I just assumed from — like all people that go to the store, you see a bottle that's similar, you look at the ingredients and you feel that the same people made it.

Q. The name Target was on the front of the bottle, was it not?

A. That is correct.

Q. Okay. What, if any, reimbursement in the way of expenses and the like are you receiving to be here?

A. They just are paying my basic expenses to get me here and house me.